

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
Interconnection Between Local Exchange)
Carriers and Commercial Radio)
Service Providers)
)
Equal Access and Interconnection Obligations)
Pertaining to Commercial Mobile)
Radio Service Providers)

CC Docket No. 95-185

CC Docket No. 94-54

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NYNEX COMMENTS

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Dated: March 4, 1996

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SUMMARY OF NYNEX COMMENTS

In December 1995 the Commission released its NPRM in this proceeding to address its concerns about LEC-CMRS interconnection charges. The NPRM sought comments and information relating to certain inquiries and tentative conclusions, the most significant of which was that the Commission should, on an interim basis, mandate a “bill and keep” compensation arrangement between these carriers.

The NPRM has now been surpassed by the enactment in February of the Telecommunications Act of 1996. As recognized by the Commission itself in a Supplemental NPRM, this landmark legislation significantly affects LEC-CMRS interconnection issues. In fact, it addresses the same concerns stated by the Commission and provides both the principles and procedures that will now govern these relationships. Specifically, Sections 251 and 252 of the 1996 Act provide for good faith negotiations, reciprocal compensation, cost-based (or cost “surrogate”-based) rates that are non-discriminatory in nature, embodied in publicly-filed contracts, mutually agreed-upon by the carriers (or arbitrated by State commissions), approved by State commissions, and reviewed for statutory compliance by federal courts. There can be no doubt that these principles and procedures will substantially change LEC-CMRS interconnection charges as they currently exist.

Similarly, there can be no doubt that, whether tested against the Communications Act historically or the new provisions of the 1996 Act, the State commissions have a primary role in the oversight and approval of intrastate LEC interconnection charges.

There is no basis in policy or law to preempt the State commissions now in order to mandate “bill and keep” compensation for intrastate communications. Moreover, the specific adoption of a “bill and keep” arrangement would constitute poor economic and telecommunications policy

The important role for this Commission is to establish the principles for interconnection as it conducts its Interconnection Proceeding and to move swiftly to review interstate LEC interconnection charges in its imminent Access Charge Reform Proceeding. It should terminate this NPRM and reject outright any invitation to establish charges in this proceeding on a preferential or piecemeal basis. Although well-intended, the establishment of ad hoc charges herein will distort pricing signals and incite uneconomic carrier conduct in the development of new systems and “rate arbitrage” that will be far more difficult to correct later.

The Commission has indicated that it is considering three models for its leadership in this area. NYNEX believes that, by terminating the NPRM and focusing its efforts on these two proceedings, the Commission can most effectively lead by adopting “a federal interconnection policy framework ...with respect to interstate services” and by serving “as a model for state commissions considering these issues with respect to intrastate services.”

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NYNEX COMMENTS

The NYNEX Companies ("NYNEX")¹ hereby submit their Comments in response to the Notice of Proposed Rulemaking ("NPRM"), released January 11, 1996, in the above-referenced proceedings, and to the Order and Supplemental Notice of Proposed Rulemaking ("S-NPRM"), released February 16, 1996. Importantly, it is of greatest significance that the S-NPRM acknowledges that the recent passage of the Telecommunications Act of 1996 ("1996 Act") may impact the tentative conclusions of the NPRM and should be considered by the parties and the Commission. In fact, the legislation has a profound impact, effectively establishing the new procedures and principles that will govern LEC-CMRS interconnection in

¹ The NYNEX Companies are New England Telephone and Telegraph Company ("NET") and New York Telephone Company ("NYT").

the future. 47 U.S.C. §§ 251-252. Thus, it fundamentally obviates the continued vitality of this rulemaking.

Nevertheless, the Commission has requested comment on numerous tentative conclusions and inquiries in the NPRM, issued before the passage of the 1996 Act. The Commission has asked the parties to structure their comments to follow a “preferred outline” (NPRM ¶133). Both because of its profound effect on the NPRM and because it was not contemplated therein, NYNEX will first address the 1996 Act as requested in the S-NPRM (Section I. below), and thereafter will follow the requested outline in addressing the NPRM conclusions and inquiries (Section II. General Comments *et. seq.*)²

² NYNEX has also provided expert economic analysis of these issues by Dr. William Taylor, Senior Vice President at National Economic Research Associates, Inc. (“NERA”). See “Taylor Affidavit” attached as Exhibit “A”.

NYNEX Comments
CC Docket No. 95-185/
CC Docket No. 94-54
March 4, 1996

I. THE 1996 ACT OBVIATES ANY NEED FOR THIS RULEMAKING

This rulemaking proceeding arises from the Commission's concerns "that existing general interconnection policies may not do enough to encourage the development of CMRS, especially in competition with LEC-provided wireline service."³ In response to these concerns, the NPRM announces tentative conclusions concerning "the policy issues involved in establishing compensation arrangements for LEC-CMRS interconnection."

That is, the NPRM states that:⁴

- (1) "in order to ensure the continued development of wireless services as a potential competitor to LEC services," the Commission should "move expeditiously to adopt interim policies governing the rates charged for LEC-CMRS interconnection:"
- (2) at least for an interim period, "interconnection rates for local switching facilities and connections to end users should be priced on a "bill and keep" basis" and that rates for dedicated transmission facilities connecting LEC and CMRS networks "should be set based on existing access charges for similar transmission facilities:"⁵

³ As background, the Commission currently requires LECs to interconnect with CMRS providers on reasonable terms and conditions, and under the principle of mutual compensation. The Commission has not set the charges for such interconnection, leaving that area for inter-carrier negotiation and agreement under State jurisdiction. However, it has indicated that it will act upon complaint to ensure that these carriers meet their common carrier obligations "to establish physical connections with other carriers."

⁴ NPRM ¶ 3.

⁵ Here the NPRM specifically seeks comments as well on "a number of alternative pricing options for LEC-CMRS interconnection compensation arrangements" (NPRM ¶ 3).

- (3) “information about interconnection compensation arrangements should be made publicly available,” whether by tariffing, public disclosure, or some other approach;
- (4) the Commission has the authority to “implement both interim and permanent interconnection policies”, although it seeks comments on the appropriate form for its action (i.e., a non-binding model, or mandatory general or specific federal requirements); and
- (5) compensation arrangements, as proposed herein, “should apply to interstate, interexchange traffic traversing interconnections between LECs and CMRS providers, which typically involve an interexchange carrier (IXC).”

The 1996 Act addresses the first four areas, declaring: (1) that the carriers involved, not the Commission, need to move quickly to negotiate “the rates charged for LEC-CMRS interconnection”; (2) that rates are to be set by agreement or, in the absence of agreement, by State commission arbitration; (3) that these agreements will be made public in the State approval process; and (4) that this Commission’s authority to mandate interconnection rates is confined to those cases where the State commissions fail to act. Given this clear declaration of law and national telecommunications policy, the purpose of the NPRM as to each of these tentative conclusions has been vitiated and it should be closed in favor of devoting limited Commission resources to other required proceedings.

The Commission may choose, of course, to proceed solely in the area of the charges for the interstate calls that fall within its jurisdiction. The NPRM itself suggests that this “interstate only” approach is under active Commission consideration (NPRM ¶108). However, even in this area, the Commission has before it a separate, future proceeding (“Access Charge Reform”) which will enable it to address the very

complex rate issues involved in interstate, interexchange LEC charges on a more complete record.⁶

**A. The 1996 Act Sets The Procedures For
Establishing LEC-CMRS Interconnection**

As recognized in the S-NPRM, the Communications Act was amended last month upon the overwhelming vote of the Congress and enthusiastic signature of the President by inter alia adding provisions which deal directly with the interconnection of LECs and CMRS providers.⁷ In Section 251(d) the Commission is directed “to establish regulations to implement the requirements of this section” which specifically describes the respective duties of “telecommunications carriers,” “local exchange carriers” and “incumbent local exchange carriers.”⁸ It details both that each telecommunications carrier (including LECs and CMRS providers) has the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers” and that each local exchange carrier has five specific obligations. Among these are the duty to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁹

⁶ Following this course, the Commission may still wish to indicate herein that certain (non-LEC) CMRS access charges are properly charged to IXCs under current Commission precedent and rules (NPRM ¶ 17). See, Section IV, infra.

⁷ 47 U.S.C. §§ 251-252.

⁸ Section 251(a)-(c).

⁹ Section 251(b)(5).

Of greatest relevance to this proceeding is that the law now establishes that both the “incumbent local exchange carriers” and “the requesting telecommunications carrier,” e.g., the NYNEX Companies and the interested CMRS providers in the NYNEX States, are to “negotiate in good faith in accordance with Section 252. the particular terms and conditions of agreement.”¹⁰ including:

“rates, terms, and conditions that are just, reasonable, and non-discriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.”¹¹

It could not be clearer now that the law does not authorize federally-mandated intrastate rates, terms or conditions for LEC-CMRS interconnection. Instead, it requires that negotiated inter-carrier agreements be timely developed pursuant to the procedures of Section 252.

In brief outline, Section 252 (entitled “Procedures For Negotiation, Arbitration, and Approval of Agreements”) continues the primary role for the State commissions with respect to intrastate communications. That is, under Section 252(a) the incumbent local exchange carrier is to negotiate “a binding agreement with the requesting telecommunications carrier.” assisted as necessary by State commission mediation. If mutual agreement is impossible, the State commission is to resolve any open issues and impose any conditions upon the parties to:

¹⁰ Section 251(c)(1), entitled “Duty To Negotiate”.

¹¹ Section 251(c)(2)(d)

- “(1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to Section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d) [Pricing Standards]; and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.”¹²

Thereafter, these agreements, whether adopted/reached by negotiation or arbitration,

“shall be submitted for approval to the State commission” pursuant to Section 252(e).

Importantly, it is only “[i]f a State commission fails to act to carry out its responsibility under this section [252]” that “the [Federal Communications] Commission shall issue an order preempting the State commission’s jurisdiction of that proceeding.”¹³

This law has clarified in detail the respective roles of the federal and State regulatory authorities. There is no room for the Commission to establish an entirely federal scheme or to mandate rates for intrastate traffic.

B. The Principles Governing Negotiated Agreements Answer Commission Concerns

In addition to specifying the procedures under which interconnection will be established, the 1996 Act also specifies governing principles and criteria which meet the

¹² Section 252(c)

¹³ Section 252(e)(5), entitled “Commission To Act If State Will Not Act.” The statute also contains specific language authorizing the State commissions to establish or enforce “other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.” Section 252(e)(3). The statute also preserves respective federal and State authority under Section 332(c)(3) with respect to regulation of CMRS providers. However, there is no federal authority found therein to separately regulate the LECs in their provision of intrastate services. See, Section III. B *infra*.

Commission's concerns. These establish a new paradigm for achieving negotiated, cost-based, reciprocal and nondiscriminatory agreements that will likely transform the current LEC-CMRS interconnection landscape. They begin with requiring that negotiations be commenced in good faith upon request and be completed within a six-month time frame. Section 252(a)-(b). These provisions answer the Commission's concern that LECs might delay CMRS interconnection (NPRM ¶ 58). Next, charges under such agreements are to be agreed upon subject to approval by the State commission (Section 252 (a), (e)), or as arbitrated based on criteria set by the statute. Sections 252 (b), (c), (e). These requirements negate any fear that the LECs will exert "market power" in the making of such agreements, and will ensure that there is "participation in the process by regulators" (NPRM ¶¶ 12, 90).

Further, such agreements will provide for reciprocal compensation as specified by statute (Section 251 (b)(5)) unless otherwise agreed by the parties. Section 252 (a). Such compensation will be based on a reasonable approximation of each carrier's "additional costs" for call termination (Section 252 (d)(2)), and they will not permit rate discrimination in the transport and termination of exchange traffic with the LECs. Section 252 (e)(2). Finally, the federal courts will directly review State commission adherence to the terms of the 1996 Act. Section 252 (e)(6). This appellate procedure will ensure a consistent nationwide application of the statutory terms and that State commissions do not prevent CMRS market entry.¹⁴

¹⁴ See, e.g., Section 332(c)(3) of the Act. The Commission will have the power to act if this does not occur.

Overall, the new law is expected to transform LEC-CMRS interconnection arrangements nationwide. The new paradigm for such agreements for NYNEX and other LECs will consist of: (a) good faith negotiations; (b) mutual and reciprocal compensation; (c) cost-based (or surrogate) rates; (d) non-discriminatory rates; (e) publicly-filed contracts rather than tariffs; (f) rates mutually agreed upon by the parties, or arbitrated by State commissions; (g) agreements approved by the State commissions; and (h) State approvals reviewed as necessary by the federal courts.

Given these landmark changes governing intrastate interconnection rates, it would be inefficient to expend limited Commission resources in further exploration of the interstate issues raised in the NPRM. Instead, the Commission's energies in this area can be more productively directed towards establishing the guidelines required by Section 251 in the "Interconnection Proceeding" and proceeding expeditiously with its planned Access Charge Reform Proceeding (NPRM ¶ 17). Following this path towards implementing the new legislation tracks closely with the first federal leadership model presented in the NPRM:

"One approach to implementing these goals would be to adopt a federal interconnection policy framework that would directly govern LEC-CMRS two-carrier interconnection with respect to interstate services and that would serve as a model for State commissions considering these issues with respect to intrastate services" (NPRM ¶ 108).

C. Interconnection Agreements Will Be Made Publicly Available Under The Section 252 Procedures

As a collateral matter, the procedures specified in Section 252 will also accomplish the Commission's purposes in considering whether to compel the publication of such agreements. Specifically, the NPRM expresses the Commission's tentative conclusion "that information about interconnection compensation arrangements should be made publicly available..." to ensure that rates are in accordance with legal/regulatory guidelines and are non-discriminatory (NPRM ¶¶ 89-90). Accordingly, the Commission seeks comments concerning the method to achieve this objective, such as tariffing, public disclosure or some other approach (NPRM ¶ 95).

As to the form of publication, NYNEX has long advocated voluntary carrier agreements because these can be more flexibly applied to the business needs of the interconnecting entities.¹⁵ As above, this view is now reinforced by the approval process directed in Section 252, i.e., LEC-CMRS agreements must be presented to the State commissions for approval. In this manner, they will be made publicly available as intended by the Commission (NPRM ¶ 91). There does not appear to be either a requirement of, or need for, tariffs in the statutory procedure.

¹⁵ See, e.g., In The Matter Of Equal Access and Interconnection Obligations Pertaining To Commercial Mobile Radio Services; CC Docket No. 94-54, RM-8012. NYNEX Reply Comments, filed October 13, 1994 at pp. 5-6.

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II. GENERAL COMMENTS (NPRM ¶¶ 4-24)

It is apparent from the foregoing that both the inquiries and tentative conclusions of the NPRM have been obviated by the passage of the 1996 Act and it is unnecessary for the Commission to continue to pursue these issues. Nevertheless, the NPRM has not yet been terminated, and because the Commission's discussion therein may be referenced in the future as authoritative, the NPRM must be answered.¹⁶

A. There Is No Need For The Commission To Adopt Interim Policies Governing Rates For Interconnection

Even if the Commission were to ignore new Sections 251 and 252 of the 1996 Act, the only basis it has for acting in a narrow, special way to mandate "interim policies" is that such action may be necessary "to ensure the continued development of wireless services" (NPRM ¶ 3). There is no basis for such concern. To begin, there is no evidence that the development of wireless services has been impeded. The year-over-year growth rate of these services continues to be astonishing, running far beyond even the most optimistic expectations. Any industry that can serve 16 million customers generating \$10.9 billion in revenues (as wireless carriers did in 1993) and then increase

¹⁶ NYNEX would prefer, however, that the Commission simply vacate the NPRM as a matter of administrative economy.

subscribership by 51 percent and revenues by 31 percent the following year, is and should be the envy of every other business venture.¹⁷ In the context of an NPRM which expresses the Commission's concern for the "development" of CMRS, it is significant that this industry segment is growing at roughly ten times (10x) the growth rate of the LECs. In noting this remarkable record, the Commission itself stated:¹⁸

"Cellular service to the public began in late 1983 and has achieved great popularity. Each year, cellular subscriber growth has approached or exceeded fifty percent -- an amazing record of sustained growth. Approximately twenty-five million persons subscribe to cellular service. The Commission recently estimated that '[c]ellular service is expected to reach twenty percent penetration, or approximately fifty-four million customers, by the year 2000.' Service revenues totaled over \$14 billion in 1994." (citations omitted)

This "amazing record of sustained growth" is clearly expected to continue for PCS services. Major corporations of world-class size and capability, such as AT&T Wireless PCS, SPRINT's WirelessCo, Pacific Telesis, Southwestern Bell and PCS PRIMECO, have invested \$7 billion in acquiring new spectrum in the "A" and "B" Blocks alone, while other auctions continue with notable success.¹⁹ The *New York Times* has reported continued extraordinary interest in the current "C" Block PCS auction:

"Two months after the Federal Communications Commission started an auction of wireless telephone licenses reserved for entrepreneurs,

¹⁷ Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report, released August 18, 1995 (hereafter "First Report"), Table 1 "Cellular Growth."

¹⁸ First Report at ¶ 13.

¹⁹ See, FCC Press Release: "FCC Hits \$15 Billion Mark In Total Net Auction Revenues," dated February 6, 1996.

start-up companies backed by giant corporations pushed bidding past \$6 billion today [2/14/96] and showed no signs of stopping there."²⁰

The capital resources of the corporate parents and sponsors backing these PCS bidders exceed the resources of all but the world's largest nations. These companies seek to enter these markets because they believe that growth will continue to be explosive. They are not dependent upon any "developmental efforts" or "interim policies." This market evidence demonstrates convincingly that no exigent Commission action is needed.

**B. The Record Of LEC-CMRS Interconnection
Refutes The Need For Interim Action**

Similarly, it is significant that there has been no record of LEC interconnection practices frustrating wireless development. As the Commission notes, it has repeatedly indicated that it would act as necessary upon any complaint filed with it under Section 208 of the Act to ensure reasonable interconnection.²¹ The NPRM does not record that the Commission has received numerous complaints, indeed any complaints, or that any received could not be resolved adequately.

Further, there are no complaints by CMRS providers pending against the NYNEX Companies in their State jurisdictions. On the contrary, the NYNEX Companies have provided interconnection on request, with the charges for such interconnection governed

²⁰ New York Times, dated February 14, 1996, at page D1; see also New York Times, dated February 26, 1996, at page D1 (bidding reached \$6.97 billion by Friday, February 16, 1996 "and the end was still nowhere in sight").

²¹ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1498 (released March 7, 1994).

--with this Commission's own concurrence -- by their State regulatory commissions.²²

There is also no record that these State commissions have failed to act responsibly in addressing these issues, frequently in the context of developing progressive policies for intrastate competition. The NPRM itself notes that "most LECs and cellular carriers say they are satisfied with the current process" (NPRM ¶ 83). Further, their principal industry representative association (CTIA) has recently stated that: "[c]ellular companies and LECs have negotiated and implemented satisfactory interconnection agreements" and that these agreements "generally produce fair and non-discriminatory interconnection arrangements."²³

As reported to the Commission last summer (NPRM ¶ 22) and as discussed with all inquiring carrier representatives, the NYNEX Companies will afford the same interconnection arrangements to PCS providers. They will also proceed to negotiate new agreements in accordance with the principles of the 1996 Act, as requested, with the expectation that the agreements reached will be approved by the State commissions.

In summary, there would be no need for the Commission to undertake a wholesale revision of its traditional interconnection policies, even in the absence of the 1996 Act.

²² "FCC Policy Statement on Interconnection of Cellular Systems", attached as Appendix B, Memorandum Opinion and Order, In the Matter of the Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services, 59 Rad. Reg. 2d 1275 (1986).

²³ Comments of Cellular Telecommunications Industry Association. Docket 94-54, at 18 and 20 (September 12, 1994).

C. If Undertaken, The Proposed Reversal Of Established Commission Policies Would Be Unlawful As Well As Unwise

The proposals in the NPRM would significantly depart from past Commission policies. This departure will have immediate and adverse consequences on the LECs. For the NYNEX Companies, the adoption of "bill and keep" would result in a loss of approximately \$48 million in revenues (based on 1995 CMRS traffic levels), and far more in 1996 and beyond as CMRS traffic (including new PCS carriers) continues to grow. (Importantly, this loss will be severely aggravated as IXCs begin to terminate their traffic to LECs via CMRS providers to gain the advantage of preferential rates.)

The Commission may not effect such a wholesale reversal of its established policies without a clear evidentiary record and factual findings that support the change. Specifically, the Commission is required to provide a "satisfactory explanation" that clearly articulates the grounds for its departure from its prior policies.²⁴ Moreover, courts

²⁴ Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), appeal after remand, State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), cert. denied sub nom., New York v. Dole, 480 U.S. 951 (1987) ["State Farm"]; American Fed'n of Labor & Cong. of Indus. Orgs. v. Brock, 835 F.2d 912, 917 (D.C. Cir. 1987) (citing Atchison, Topeka & Santa Fe R.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973)); Greater Boston Television Corp. v. Federal Communications Comm'n, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, [note omitted] and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute. [cite omitted]"; New York Council, Ass'n of Civilian Technicians v. F.L.R.A., 757 F.2d 502, 512 (2d Cir. 1985), cert. denied, 474 U.S. 846 (1985) ["New York Council"] ("The need to give particularized findings is especially critical when the decision constitutes an overruling of an established policy").

have held that the change in policy must be justified by the record.²⁵ There also must be a “rational connection between the facts found and the choice made.”²⁶

Here, the proposals fail to meet these requirements. Most notably, the Commission has proposed to “remedy” non-existent barriers to CMRS entry, without establishing that such barriers exist, that the proposed change in policy would, in fact, overcome the barriers and facilitate entry, or that the States were not already taking appropriate measures in accordance with previously established Commission policies to assure a competitive market. This then is a remedy without a malady.

State Regulation. The only criticism which the Commission levies at its current policy is that “LECs clearly would benefit competitively from maintaining high, even if symmetrical, interconnection charges,” because LECs terminate more calls for CMRS providers than CMRS providers do for LECs (NPRM ¶ 14). In order to justify the remedy proposed in the NPRM, the Commission must show at a minimum that States are restricting entry because of unreasonably high interconnection charges. The NPRM makes no such findings, and none can be made given the robust expansion of CMRS services and the lack of any evidence that interconnection charges, in particular, are so

²⁵ State Farm, 463 U.S. at 43 (agency rule would normally be considered arbitrary and capricious if agency has failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence.): New York Council, 757 F.2d at 508 (citing to State Farm, 463 U.S. 29).

²⁶ State Farm, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

prohibitively high that they form a barrier to entry; nor do they constitute a significant portion of most CMRS end user customer airtime rates.

Reasonable Alternatives. In addition, "the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review", including an explanation of why the rationale for the existing policy is "no longer dispositive" (emphasis omitted).²⁷ Thus, the Commission must consider alternatives which do not disrupt the current balance of federal and State regulation which would accomplish its objectives to encourage entry (to the extent it finds entry is impeded by interconnection policies) and explain why such alternatives are not appropriate.²⁸ In this case, if the LECs have market power and may have the incentive to erect barriers to CMRS entry in the form of high (even if symmetrical) interconnection rates, the NPRM fails to establish that State rate regulation has not adequately addressed this problem. The Commission implicitly recognized this fact in finding that "a large number of states have removed many of the legal barriers to competition for local services" (NPRM ¶ 24), and that "[w]e recognize that states share

²⁷ New York Council, 757 F.2d at 508; Gulf Power Co. v. Federal Energy Regulatory Comm'n, 983 F.2d 1095 (D.C. Cir. 1993) (holding agency erred in imposing a disproportionately harsh sanction without explaining its reasoning for departing from past policy and failing to examine "possible alternative sanctions").

²⁸ See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994); State Farm, 463 U.S. at 42. Compare People of the State of California v. Federal Communications Comm'n, 96 Cal. Daily Op. Serv. 671M, 1996 WL 35901 (9th Cir. 1996) ["California v. FCC"] (upholding FCC free passage rule "because the record shows the FCC examined the relevant evidence and adequately explained all aspects of the decision").

our goals of stimulating economic growth by promoting the development of CMRS, which would upgrade the nation's telecommunications infrastructure and would help make available broader access to communications networks" (NPRM ¶ 107). Tested against this background, the adoption of the proposals made in the NPRM to impose new federal interconnection mandates that would preempt State implementation of these policies do not withstand the rationality test.

Interim Rates. The NPRM cannot justify its change in policy by labeling its proposal as an "interim" rule. The fact that an agency proclaims a rule to be interim does not shield it from the need to satisfy the standards described above.²⁹ Virtually every rule and policy is "interim" in the sense that it is subject to change if circumstances change or the agency uncovers additional information warranting modification. An "interim" rule is subject to the requirements of the Administrative Procedures Act ("APA"), including the right to obtain judicial review, to the same extent as a "final" rule.³⁰ In any event, application of the legal standard that an agency must provide a reasoned opinion or analysis to support a change in policy is applicable to any administrative

²⁹ Consumer Fed'n of Am. v. Federal Power Comm'n, 515 F.2d 347, 358, n.64 (D.C. Cir.) cert. denied 423 U.S. 906 (1975) (citation omitted) (Federal Power Commission cannot deviate from statutory standard, even where a regulatory action may be temporary, because "not even 'a little unlawfulness is permitted'").

³⁰ See, e.g., Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908, 918 (D.C. Cir. 1982) ("calling the rule adopted an 'interim' one does nothing to insulate it from the judicial review authorized in the APA"); Gas Appliance Mfrs. Ass'n, Inc. v. Dept. of Energy, 773 F. Supp. 461, 464 (D.D.C. 1991) reversed on other grounds 998 F.2d 1041 (D.C. Cir. 1993) (Under APA, Court "can review the interim rule as a final agency action, regardless of whether the interim standard may differ from the final standard to be promulgated after the demonstrated projects are completed").

decisionmaking.³¹ The NPRM has failed to establish any basis for implementing an interim policy particularly when, as noted above, the NYNEX Companies will experience a loss of revenues in excess of \$48 million³² even if the “interim policies” are in place for only one year.³³

In sum, the Commission cannot proceed on any basis, interim or otherwise, without meeting the prerequisites necessary for the adoption of a change in policy. The discussion set forth in the NPRM falls short of the necessary showings. Moreover, the Commission now has no reason to act on a piecemeal, short-term basis, given the recent passage of the 1996 Act.

³¹ See, e.g., Citizens Awareness Network Inc. v. Nuclear Regulatory Commission, 59 F.3d 284, 291 (1st Cir. 1995) (policy change announced in two internal staff memos that failed to give justification or reasoning for change is arbitrary and capricious).

³² Compare California v. FCC, (Commission order upheld over protests of IXC inter alia because the Commission found based on record evidence that IXCs marginal costs of transporting CPN over completed SS7 systems were de minimus and that IXCs were already recovering their overall investment in the system).

³³ NYNEX understands that the press of the regulatory workload can cause “interim policies” to remain in effect for years. Unfortunately, the current workload requirements for implementing the 1996 Act, and the budget-related shortage of Commission personnel, strongly indicate that these “interim policies” may be long-standing in effect.

<p align="center">NYNEX Comments CC Docket No. 95-185/ CC Docket No. 94-54 March 4, 1996</p>

III. COMPENSATION FOR INTERCONNECTED TRAFFIC BETWEEN LECs AND CMRS PROVIDER'S NETWORKS (NPRM ¶¶25-81)

The Commission turns next to the issues of LEC-CMRS interconnection which are at the heart of the NPRM. It first considers existing compensation arrangements, general pricing principles, and its specific pricing proposals (NPRM ¶¶ 25-81). These are addressed in Section A below, as requested. Thereafter, it addresses the "implementation of compensation arrangements," discussing the form of such arrangements (e.g., negotiated agreements, tariffs, other) and jurisdictional issues relating to its authority to require specific arrangements (NPRM ¶¶ 82-113). These are addressed in Section B below, as requested. More importantly, these inquiries have been answered by the 1996 Act and set on a course for resolution which does not require their further pursuit herein.

A. Compensation Arrangements (NPRM ¶¶ 27-41)

The NPRM theoretically divides all compensation arrangements into three categories: "reciprocal," "cost-based" and "bill-and-keep." The NPRM also inquires into the activities of State regulatory commissions in this area (NPRM ¶¶ 40-41). In fact, LEC compensation arrangements cannot be so easily categorized, resulting as they do in the resolution of many complex State rate structure and level issues for local exchange service issues. The 1996 Act has recognized this complexity and has specifically avoided

mandating any specific compensation arrangement. Instead, Congress left such matters for mutual intercarrier resolution in accordance with statutory principles, subject for intrastate communications to State commission approval. This legislative scheme fits well within the type of State regulatory activity governing the NYNEX Companies to date, which is described below. Nevertheless, with the advent of new federal law, NYNEX recognizes that a new interconnection paradigm has been established which will require both LECs and State commissions to reevaluate past positions.

**(1) Past State Commission Actions Have Provided For
Reasonable NYNEX Interconnection Charges**

The Commission first seeks information concerning the extent to which State commissions have provided for a regulatory scheme ensuring timely interconnection at reasonable rates. As discussed below, the State commissions governing the NYNEX Companies have been actively involved in LEC interconnection rates as they also considered the broader issues of intrastate competition generally.

To begin, the key leadership role played by the New York State Public Service Commission ("NY PSC") in establishing rules for intrastate service competition is well known. In adopting a performance-based incentive regulation plan for NYT, the NY PSC has also established the parameters for LEC-CMRS interconnection charges pursuant to which NYT rates are now filed in State tariffs.

Similar State interest and activity has been demonstrated throughout the remainder of the Northeast. In Maine, the Public Utilities Commission has approved the rates